

"Motion to strike the counterclaim is granted, without prejudice to the claimant's rights to challenge the libel by appropriate exceptions."

On February 2, 1944, the claimant filed exceptions to the libel, and thereafter made a motion for an order sustaining the exceptions and dismissing the libel. At the conclusion of the hearing on the matter, and after due deliberation, the court, on May 2, 1944, handed down the following memorandum opinion:

MOSCOWITZ, *District Judge*: "Exceptions have been filed to the libel based upon two grounds: One, that the libel is insufficient, and the other, that Section 343 (d) of the U. S. Code is unconstitutional.

"Section 343 (d) reads as follows: 'A food shall be deemed to be misbranded * * * (d) If its container is so made, formed or filled as to be misleading.'

"As I understand claimant's position, it is claimed that this is not sufficiently descriptive and would not afford an opportunity to a seller, packer or shipper to determine what is a proper container. The criticism is that this subdivision (d) also involves a conclusion rather than specifying the grounds sufficiently and for that reason is unconstitutional and that the claimant is thereby deprived of his property without due process of law.

"It seems to me that this provision is specific and does not violate any constitutional rights of the claimant.

"As to the first ground, that the libel is insufficient, there has been produced to the Court for visual demonstration, Libelant's Exhibit 1, which is one of the packages in question, which is substantially similar to the other packages shipped by claimant. I think the libel upon its face is complete and sets forth a prima facie cause of action; an examination of the Exhibit 1 indicates that a purchaser might be misled. It might very well be that upon the trial some other demonstration can be made; that it may very well be, as claimed by the claimant, that it was necessary to ship it in that way. However, I am not passing upon that question; that is to be passed upon by the trial court.

"I will overrule exceptions to the libel."

On May 19, 1944, an order was issued denying the claimant's motion and overruling the claimant's exceptions to the libel. Thereafter the claimant withdrew its claim and answer, and on August 8, 1944, judgment of condemnation was entered and the product was ordered destroyed.

7193. Adulteration of gift packages. U. S. v. 20 Boxes and 31 Boxes of Gift Packages. Default decree of condemnation and destruction. (F. D. C. Nos. 12006, 12007. Sample Nos. 30373-F, 60520-F.)

LIBEL FILED: March 14, 1944, Northern District of California.

ALLEGED SHIPMENT: On or about November 30, 1943, by Golden Brand Nut Products, Inc., from New York, N. Y.

PRODUCT: 51 3-pound gift packages at San Francisco, Calif.

The product was a confection-type pack consisting of assorted cookies, candies, and fruit pastes.

LABEL, IN PART: (Sticker on bottom of box) "Victory Snack-Pack No. 9253."

VIOLATION CHARGED: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a filthy substance by reason of the presence in the fruit pastes of worm and insect fragments and rodent hairs.

DISPOSITION: June 9, 1944. No claimant having appeared, judgment of condemnation was entered and the article was ordered destroyed.

MISCELLANEOUS FOODS

VITAMIN PREPARATIONS AND FOODS FOR SPECIAL DIETARY USES

7194. Adulteration and misbranding of candy. U. S. v. 59 Packages of Candy. Default decree of condemnation. Product ordered delivered to a local hospital. (F. D. C. No. 12911. Sample No. 60938-F.)

LIBEL FILED: July 12, 1944, Eastern District of Louisiana.

ALLEGED SHIPMENT: On or about June 12, 1944, by Joe Franklin Myers, from Dallas, Tex.

PRODUCT: 59 8-ounce packages of candy at New Orleans, La.

Examination showed that the product contained less than 50 U. S. P. units of vitamin A per pound.

LABEL, IN PART: (Packages) "Smile Sticks"; (leaflet) "These candies when made contained 800 or more U. S. P. units of Carrotene (Vitamin A) * * * to each pound."

VIOLATIONS CHARGED: Adulteration, Section 402 (b) (1), a valuable constituent, vitamin A, had been in part omitted or abstracted from the article.

Misbranding, Section 403 (a), the statement in the leaflet, "These candies when made contained 800 or more U. S. P. units of Carrotene (Vitamin A) * * * to each pound," was false and misleading as applied to the article since it did not contain the amount of vitamin A stated and implied; and the statement on the label "Ingredients * * * vitamin A," was misleading, since the article supplied less than 1 percent of the minimum adult daily requirements of vitamin A, in the entire 8-ounce package, an inconsequential amount; Section 403 (j), the article purported to be and was represented as a food for special dietary uses by man by reason of its vitamin A, vitamin B₁, riboflavin, vitamin C, and calcium and phosphorus content, and its label failed to bear, as required by the regulations, a statement of the proportion of the minimum daily requirements of vitamin A, vitamin B₁, riboflavin, and vitamin C, and the minerals calcium and phosphorus, furnished by a quantity of the product reasonably suitable for and practicable of consumption within a period of 1 day; and, Section 403 (e) (1), it was a food in package form and failed to bear a label containing the name and place of business of the manufacturer, packer, or distributor.

DISPOSITION: August 28, 1944. No claimant having appeared, judgment of condemnation was entered and the product was ordered delivered to a local hospital.

7195. Adulteration and misbranding of orange drink. U. S. v. 194 Cases of Orange Drink. Default decree of condemnation and destruction. (F. D. C. No. 13112. Sample No. 68474-F.)

LIBEL FILED: August 1, 1944, Eastern District of Kentucky.

ALLEGED SHIPMENT: On or about July 20, 1944, by Jay-Lee Products Co., Cincinnati, Ohio.

PRODUCT: 194 cases, each containing 6 ½-gallon bottles, of orange drink at Newport, Ky.

LABEL, IN PART: (Bottles) "A Food Product Containing Fruit Juice * * * Juice Rich California Orange Drink * * * Rich in Vitamin B₁ 2700 Int. Units B₁ added Healthful For children and adults * * * Juice Rich Citrus Products Co. * * * Cincinnati, Ohio."

VIOLATIONS CHARGED: Adulteration, Section 402 (a) (2), the product contained monochloroacetic acid, which was unsafe within the meaning of the law in that it was an added poisonous and deleterious substance which was not required in the production of the article and could have been avoided by good manufacturing practice; Section 402 (b) (2), an artificially colored mixture of water, about 10-percent orange juice, added orange oil, and acid had been substituted for a drink rich in orange juice, which the article purported to be; Section 402 (b) (3), inferiority had been concealed by the addition of artificial color, orange oil, and acid; and, Section 402 (b) (4), artificial color, orange oil, and acid had been added to the article and mixed and packed with it, so as to make it appear to be a drink rich in California orange juice, which was better and of greater value than the article was.

Misbranding, Section 403 (a), the statements, "A Food Product Containing Fruit Juice * * * Juice Rich California Orange Drink * * * Healthful," and the design of oranges on the bottle label, were false and misleading as applied to the article, which was an artificially colored mixture of water, about 10-percent orange juice, added orange oil, and acid, and which contained practically no vitamin C, the one vitamin which would be expected by consumers to be present in substantial amounts in an orange juice product; and, Section 403 (j), it purported to be and was represented as a food for special dietary uses by reason of its vitamin B₁ content, and its label failed to bear, as required by the regulations, a statement of the proportion of the minimum daily requirement of vitamin B₁ supplied by a specified quantity of the product customarily or usually consumed during a period of 1 day.

DISPOSITION: August 22, 1944. No claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.